IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1105

ANTHONY HERBERT, *Petitioner*

v.

BARRY LANDO, MIKE WALLACE and CBS, INC.,
Respondents

BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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PRELIMINARY STATEMENT

By consent of the Petitioner and the Respondents herein, the American Newspaper Publishers Association submits this brief as *amicus curiae*. Copies of the written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of 1293 newspapers constituting more than 91 percent of the

total daily and Sunday newspaper circulation and a significant portion of the weekly newspaper circulation in the United States. ANPA is concerned with issues of general significance to the profession of journalism and the newspaper publishing business and, over the years, ANPA on several occasions has presented its views to this Court as an *amicus curiae* in cases touching on these concerns.

ANPA agrees with the statements of the case as presented by both Petitioner and Respondents; the Association enters this case as *amicus curiae* on the basis of its belief that the constitutional issue posed by Petitioner and respondents could have, and should have, been avoided. ANPA contends that the lower courts, prior to considering the First Amendment issue raised, should have addressed the requests of Petitioner, and Respondents' refusals to comply with such requests, in the context of the limits and restrictions on the scope of discovery available under the Federal Rules of Civil Procedure.

Recognizing that the permissible scope of discovery is a matter left to the discretion of the trial judge, ANPA asserts that, in the instant case, the trial judge failed to properly evaluate and balance the competing interests of the Petitioner in obtaining discovery of certain matters and the concomitant public interests in preserving the confidentiality of such matters. Your *amicus* suggests that there is a significant public interest in preserving the confidentiality of the editorial thought process and, thereby, insuring that there will be "uninhibited, robust, and wide open" debate in the newsroom which will lead to the publication of complete and accurate information and news.

Just as the compelled disclosure of affiliations with groups engaged in advocacy entails "the likelihood of a substantial restraint upon the exercise of . . . [the] right of freedom of association," *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958), the compelled disclosure of the thought processes of editors and reporters in civil libel suits may have an inhibitory effect upon "free expression" in the newsroom. This Court's recognition of the constitutional role of "an untrammeled press as a vital source of public information," *Grosjean* v. *The American Press Co.*, 297 U.S. 233 (1936), necessitates a consideration and balancing of the public interest in preserving the confidentiality of the editorial thought process against an individual libel plaintiff's need to have access to such information. For this reason, ANPA supports the holding of the United States Court of Appeals for the Second Circuit and desires to present to this Court, for its assistance, the Association's views in regard to the matter involved in the instant case.

ARGUMENT

Notwithstanding that the Court of Appeals decided the instant case on constitutional grounds, the controversy related to the permissible scope of discovery in a public figure libel case. The decision giving rise to the appeal resulted from the trial court's ruling on Herbert's motion to compel discovery pursuant to Federal Rule of Civil Procedure 37(a)(2). Your *amicus* suggests that resolution of the constitutional issue could have been avoided had the court focused specifically on the scope of discovery issue. "[N]o matter how much [the litigants] may favor the settlement of an important question of constitutional law, broad considerations of the appropriate exercise of judicial

power prevent such determinations unless actually compelled by the litigation before the Court." *Barr* v. *Matteo,* 355 U.S. 171, 172 (1957).

As was so well articulated by Judge Kaufman and Judge Oakes in the opinions below, there is a significant public interest in preserving the confidentiality of the thoughts and opinions of editors and reporters relating to their determinations as to what will be published. The inhibitory effect on the editorial thought process which would flow from the forced disclosure of such mental processes would redound to the public detriment in that the public's expectation of, and right to receive, complete and accurate information would be diminished.

There is also, however, a significant public interest in according to civil litigants ample and broad discovery of those matters which are relevant to a given lawsuit. The basic philosophy of the modern discovery rules is that each party shall have access to all relevant information, which is not privileged, and thus be able to prepare his case for trial in a manner that will promote a just, speedy, and inexpensive determination of the action. "Modern instruments of discovery serve a useful purpose . . . .They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States* v. *Proctor & Gamble Co.,* 356 U.S. 677, 682-83 (1958).

Although liberal and extensive discovery is permitted under the Federal Rules of Civil Procedure, there are, necessarily, some limitations imposed, and certain matters are barred from discovery. The rules themselves

designate some of the areas in which discovery will not be permitted. For example, there may be no inquiry as to an attorney's "work-product," FRCP 26(b)(3); nor may discovery be had of materials which are protected by a recognized privilege, FRCP 26(b)(1) and Federal Rule of Evidence 501. The rules, however, do not specify with particularity every area in which discovery may be limited or foreclosed. Rather, the determination of what restrictions or limitations on discovery are required is left to the sound discretion of the trial judge to be exercised on a case-by-case basis.

Under The Federal Rules of Civil Procedure Pertaining to Discovery, a Court Must Balance the Public Interest in Preserving the Confidentiality of Opinion Matter Against the Discovering Party's Need for the Information Before Determining the Permissible Scope of Discovery

Whenever a trial court is presented with a motion under Rule 26(c) to limit discovery, or a motion under Rule 37(a)(2) to compel discovery, it must, within the sound exercise of its discretion, consider the factors contained in Rule 26 which outline the permissible boundaries of discovery.[1] Just as the rules afford broad latitude for discovery, a trial judge is granted broad power to limit or restrict discovery.

> "Rule 26(c) was added as a safeguard for the protection of parties and witnesses in view of the almost unlimited right of discovery given by Rule 26(b). The provision emphasizes the complete control that the court has over the discovery process. It is impossible to set out in a rule all of the cir-

[1] FRCP 37(a)(2) provides that:

> If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

> cumstances that may require limitations that may be needed. The rules, instead, permit the broadest scope of discovery and leave it to the enlightened discretion of the district court to decide what restrictions may be necessary in a particular case. . . . [A] court may be as inventive as the necessities of a particular case require in order to achieve the benign purpose of the rule."

8 Wright & Miller, Federal Practice and Procedure, § 2036 at 267-269 (footnotes omitted).

While Rule 26 contains several specific references to factors to be considered in limiting the scope of discovery, in the instant case the primary justification for imposing restrictions stems from the public interest in protecting from discovery certain confidential or sensitive matters. "The public interest may be a reason for not permitting inquiry into particular matters by discovery." 4 Moore, Federal Practice, ¶ 26.22(2) at 1287 (2d Ed. 1969). In this case, it is the public interest in preserving the confidentiality of the editorial thought process which calls for restriction of discovery. As noted by the Court of Appeals and amply discussed in the Brief of Respondents, there is a significant public interest in preserving the confidentiality of editorial thought processes. Journalists, faced with the prospects of having to reveal their thoughts, opinions and conclusions in civil lawsuits, would be inhibited from fully and frankly examining and discussing their concerns before publishing sensitive news stores. The public has an interest in receiving true and accurate information from the press, and that interest can best be served by shielding the editorial thought process from overbroad discovery and thereby insuring that controversial stories and/or stories involving contradictory versions

of events will be fully explored and discussed prior to publication.

The courts, in a variety of situations, have limited and/or restricted discovery due to the public interest which is served by preserving confidentiality. In each such case, the court has balanced the public interest in maintaining confidentiality against the moving party's need to discover the information sought for purposes of preparing his lawsuit. Although the courts almost always grant discovery of non-privileged facts, they, generally, have denied discovery of opinions, conclusions or thoughts.

In *Frankenhauser* v. *Rizzo,* 59 FRD 339 (E.D.Pa. 1973), the plaintiffs sought discovery of police investigative reports concerning the shooting incident which formed the basis of their civil rights action against the police. Plaintiffs asserted that the discovery was essential to preparation of their case. The defendants asserted executive privilege and argued: "[P]olice investigations such as the one here involved are made under a veil of confidentiality and . . . it would contravene the public interest and would impair the functions of the police department if the results of such investigations were disclosed. [Defendants] contend that destruction of the confidentiality of police investigative records would have a 'chilling effect' upon the department and would impede candid and conscientious self-evaluation of actions of the department." 59 FRD at 342. The court, after a lengthy discussion of the considerations governing the scope of discovery in that particular situation, held that witness statements and those portions of the police reports containing factual data were discoverable. The evaluative summary portions of the reports, however, were held not subject to discovery.

The same result was reached in similar circumstances in *Gaison* v. *Scott,* 59 FRD 347 (D.Hawaii 1973).

The "interest of promoting the free and candid interchange of ideas as a means to achieving effective executive decisions . . ." was held to prohibit the defendants from probing the thoughts of a governmental official in *Securities and Exchange Commission* v. *Perera Company,* 47 FRD 535 (S.D.N.Y. 1969). There, the defendants in an action under the Securities Act of 1933 asserted that an advisory opinion released by the Securities and Exchange Commission was "deceitful" and intentionally misleading. They sought to depose the official who had been ultimately responsible for the issuance of advisory releases. The court, noting that it was necessary to "carefully weigh" the "competing interests," found that it was not in the public interest to compel the government to disclose its "prefatory thinking".

Cases in which there was an asserted "executive privilege" are not, however, the only instances in which discovery of opinions has been denied because of the public interest in confidentiality. Even in the absence of any conditional privilege recognized by law, the courts have barred discovery of opinions and conclusions where the need for preserving confidentiality overrode the need for discovery. In the leading case of *Bredice* v. *Doctors Hospital, Inc.,* 50 FRD 249 (D.D.C.), *adhered to,* 51 FRD 187 (D.D.C. 1970), *aff'd.,* 479 F.2d 920 (D.C.Cir. 1973), the court barred discovery of the minutes and reports of boards and committees of the defendant hospital which related to the circumstances of the death of a patient which gave rise to the malpractice lawsuit. The defendant hospital held periodic "staff meetings" to review and analyze

clinical work for the purpose of improving hospital and medical standards. Although the decedent's treatment was discussed at one of these meetings, the court held that the "overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded" created a qualified privilege which barred discovery:

> "Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practice is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit."

50 FRD at 250. The same reasoning was followed in *Gillman* v. *United States,* 53 FRD 316 (S.D.N.Y. 1971), wherein the court granted discovery of those portions of the reports containing testimony as to the incident but denied discovery as to those portions which evaluated the hospital procedures and made suggestions as to future procedures.

Similarly, in an employment discrimination case the court denied discovery of so much of the defendant's internal reports on its progress in the equal employment opportunity area as indicated "candid self-analysis and evaluation of the Company's actions" in that area. *Banks* v. *Lockheed-Georgia Company,* 53 FRD 283 (N.D.Ga. 1971). While the court held that discovery could be had of factual matter contained in the re-

port, it determined that it "would be contrary to [public] policy to discourage frank self-criticism and evaluation", and that to permit discovery of evaluations and opinions "would not be conducive to compliance with the law." 53 FRD at 285.

Those portions of a Forest Service Investigator's report on a fire which represented "mere guesses, opinions, theories, comments or recommendations of witnesses or of an investigator, or mere summations or notations made by him concerning information orally obtained from witnesses" were barred from discovery in *People of the State of California* v. *United States,* 27 FRD 261 (N.D.Cal. 1961), although discovery was allowed as to statements of witnesses and statements of fact contained in the report. The court, while recognizing that this Court's opinion in *Hickman* v. *Taylor,* 329 U.S. 495 (1947), mandated that either party could be compelled "to disgorge whatever facts he had in his possession", stated that opinions, theories or recommendations were akin to "work-product" and, therefore, deserving of protection from discovery:

> "Although such a report is not entitled to protection under the 'attorney-work-product' privilege . . ., because it generally is made by an investigative agent acting in other than a legal capacity, where it contains material in the nature of opinion, theory, or recommendation, made either by witnesses or the investigator, such a document or report partakes of the nature of an attorney's notes in preparation of his case, and production of such material should, therefore, be conditioned upon a strong showing of necessity."

27 FRD at 262.

In all of the above cases, the courts have permitted discovery of factual matter but have barred discovery of opinion matter. The reason for limiting discovery in those cases was that there was a public interest in preserving the confidentiality of the opinion matter which, on balance, outweighed the need of the discovering party to be granted access to such material. In the instant case, Respondents have supplied Petitioner with *extensive* documents and testimony as to the factual matters sought; it is only the opinion matter which Respondents have refused to supply.[2]

As was pointed out above, there is a significant public interest in preserving the confidentiality of the editorial thought process from discovery. Moreover, as in *People of the State of California* v. *United States, supra,* the opinions and conclusions of editors are akin to the "work-product" of attorneys. Editors and reporters are well acquainted with the law of libel and the standards of care applicable thereto, and pre-publication discussions of news stories involve frank evaluations of the potential of a story to give rise to a libel claim. Were such evaluative discussions to be subject to discovery, reporters and editors would be reluctant to speak with candor and would be inhibited from fully expressing their views to the ultimate detriment of professional presentation of news to the public.

The permissible scope of discovery must be determined on a case-by-case basis. The trial judge must

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[2] As pointed out by the Court of Appeals, the extensive amount of material already provided to Petitioner through discovery is more than ample for him to present a case to the jury and allow the jury to determine whether or not the publications were made with actual malice. *Herbert* v. *Lando,* 568 F.2d 974, 984 and 992-93 (Oakes, J. concurring) (2d Cir. 1978).

evaluate the discovering party's need for the information, consider the amount of discovery which already has taken place, determine the burden which would be imposed on the non-discovering party(ies), and, finally, balance the competing interests. In the instant case Respondents have supplied Petitioner with full discovery as to their sources and the information they provided (including transcripts of interviews), copies of documentary source materials, a series of drafts of the "60 Minutes" telecast, and the contents of pre-telecast conversations between Lando and Wallace. In view of this completely reasonable and adequate discovery, further inquiry into the necessarily tentative conclusions and mental impressions which evolved in the minds of Respondents in the course of their pre-publication editorial thought process must not be permitted to take precedence over society's vital stake in preserving and encouraging candor and professionalism in the corroborative examination and re-examination by editors of news gathered for possible publication.

CONCLUSION

It is respectfully submitted that, for the reasons stated above, the holding of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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